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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 172

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

J. C. VAN LIEROP,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATEMENT OF THE CASE

Under *Perishable Protective Tariff No. 14 ICC 25* (hereinafter referred to as ICC 25), the shipper could have ventilation in conjunction with heater service in heater territory by requesting *Carriers' Protective Service,* rather than *Carriers' Protective Service: keep vents closed.* Rule 515 (D) ICC 25. Outside of choice of service, the shipper could give no other instructions for handling in heater territory. Rule 515, ICC 25. Beyond heater territory ventilation was combined with heater service by mandate of the Tariff Rule 514, ICC 25.

Ventilation is essential for safe transportation of gladioli bulbs (R. 136, 137, 152, 153, 156, 417). The gladioli bulbs were packaged in burlap bags, the customary container for shipment (R. 126, 280); and the bags were loaded in a manner to provide air channels between the bags for the purpose of providing ventilation, as was customary practice of loading (R. 130, 131, 166). The bulbs, when loaded in cars will sweat and create moisture (R. 136, 156, 417), and create a natural heat (R. 152). The moisture must be taken out by ventilation (R. 136, 137,

152, 153, 156, 157). With the moisture taken out, a temperature of 40 to 60 degrees will not hurt the bulbs (R. 136, 412); but, with moisture, the bulbs will break their dormancy and start to grow at a temperature as low as 40 degrees (R. 156, 363, 412). The temperature determined by the carriers for safe transporation was 32 degrees (R. 319). Too high a temperature was maintained in the cars (R. 309-314). The carriers did not ventilate, except on few occasions where cars were standing (R. 309-314, 375-377).

Petitioner on page 3 of Petition cites Rule 514 (G), meaning to cite Rule 514 (J).

The bulbs were not diseased when shipped, and were damaged in transit (R. 432).

STATEMENT RE LACK OF JURISDICTION

I. There is no jurisdiction for the granting of the petition in certiorari.

(a) Where the record before this Court fails to indicate a Federal question, certiorari to a State Supreme Court may not be granted.

No tariffs are of record for the consideration of the petition in this case.

Tariffs not being a part of the record in this Court, the interpretation of the Supreme Court must be considered. *Louisville and Nashville Ry. Co. vs. Maxwell,* 237 U. S. 94, 35 S. C. R. 94 (1915). But in the case at bar, the Supreme Court did not interpret or quote the tariffs referred to. The record does not indicate change of the tariffs referred to in the petition were in evidence in the trial Court. Respondent is of the belief that at least one of the tariffs so referred to is mentioned for the first time in the petition for certiorari. Whether there is a "right, privilege or immunity" which petitioner can claim cannot appear from the ICC Act standing alone. The record, as it now stands supporting the petition fails to indicate a Federal question and therefore, it is submitted that the writ for certiorari should be denied.

Without waiving in any respect the question of jurisdiction, respondent further respectfully alleges that this is not a proper case for the granting of certiorari for the reasons hereinafter set forth.

ARGUMENT

(Perishable Protective Tariff No. 14, I.C.C. 25 is cited in this Brief as ICC 25.)

I. THE QUESTION PRESENTED BY PETITIONER WAS NOT DULY RAISED IN LOWER COURT EXCEPT AS RAISED IN CLAIM OF ERROR IN TRIAL COURT'S INSTRUCTION TO JURY, ON APPEAL TO THE SUPREME COURT OF MICHIGAN.

The question raised here by Petitioner, regardless of how stated in its petition on pages 8 and 9, and in its brief on pages 11-12, simply stated, is whether ventilation service can be furnished in conjunction with Carriers' Protective Service under the applicable tariff provisions.

This question in any of its forms has not been raised in the lower court for consideration.

The nearest approach to it is Petitioner's claimed error No. 3 of its brief on page 11. This refers to the trial court's instruction, claimed erroneous in its assignment of error No. 37, raised for the first time in the Michigan Supreme Court (R. 494, Petition 7). Raised in this manner, the question in the lower court was limited to the correctness of the trial court's instruction.

The questions raised by Petitioner in its brief and argument in the lower court are as follows:

"1. Was the following charge contrary to existing law and did the court err in giving such charge to the jury?

> 'From Grants Pass, Oregon, to Chicago, Illinois, the cars in question were under the so-called Carriers' Protective Service, which means that the carriers were to protect the shipment against frost, freezing, or artificial overheating, furnishing, if necessary, artificial heat *and ventilation* or such other protective service as might be necessary to obtain that result. (R. 426)'.

"2. Was the verdict and judgment contrary to the great weight of evidence?

"3. Should Defendant's motion for directed verdict have been granted?

"4. Should Defendant's motion for judgment notwithstanding the verdict have been granted?

"5. Did Plaintiff fulfill his duty to mitigate his damages?

"6. Was the verdict and judgment excessive?

"7. Did the court err in denying Defendant's motion for new trial?"

The lower court in its decision answered all questions raised (R. 500-508).

The Michigan Supreme Court does not pass on arguments raised in brief but not included in statement of questions involved, *Marrs vs. Taylor,* 327 Mich. 674, 42 N.W. 2d 780; nor on questions raised in statement thereof but not argued in brief, *Gerweck vs. Monroe Co. Treasurer,* 317 Mich. 53, 26 N.W. 2d 864; nor on questions not raised in statement of reasons and grounds for appeal, *Baumgarten vs. Tasco,* 312 Mich. 161, 20 N.W. 2d 144 (R. 4-7, 492, 494).

This Court held, in *New York Dock Co. vs. The Poznan,* 274 U. S. 117, that questions for review on certiorari to be considered must have been duly raised in the court below.

Then, the only question for consideration here is Petitioner's question No. 3, as set forth in Petitioner's brief on page 11, which is:

> "3. In upholding as a definition of carriers' protective service a definition which does not appear in the tariff."

This question is limited to the correctness of the trial court's instruction to the jury. In deciding this question it was not necessary for the lower court to do more than consider and construe the definition of Carriers' Protective Service, Item 1165, Perishable Protective Tariff No. 14, ICC 25, which reads as follows:

> "CARRIERS' PROTECTIVE SERVICE
>
> 'Carriers' Protective Service' means that the carriers will protect the shipment within the Heater Territory (See Rule 500) against frost, freezing, or artificial over-heating, *furnishing, if necessary,* artificial heat *or such other protective service as may be necessary to obtain that result."* (Italics supplied).

Where the service contracted by the shipper was "Carriers' Protective Service" and not "Carriers' Protective Service: keep vents closed", Rule 515 (D), ICC 25, and the carriers were in full control of the cars (R. 503, 505), it is obvious that the language of the definition placed in italics above included "ventilation" as *such other service* to prevent artificial over-heating by reduction of car temperatures. The lower court, in deciding that the trial court's instruction was not erroneous, stated:

> "Under the weather conditions existing at the time of the shipments, ventilation or artificial heat was necessary in order that the bulbs could have a degree of temperature that would not cause freezing or overheating" (R. 505).

In addition to this, Petitioner, in its Petition on page 3, states as follows:

> "Where necessary to dissipate surplus artificial heat, carriers will adjust ventilators, as in this case (R. 309-314)."

It is Respondent's contention that the trial court's instruction was not erroneous as found by the lower court; that the claimed error in this instruction is the only question properly raised in the court below and presented here for consideration; that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

However, in the event the Court decides that the questions presented by Petitioner are properly raised here for consideration, Respondent, in the argument that follows, answers Petitioner's brief to show that furnishing of ventilation in conjunction with Carriers' Protective Service was not prohibited by applicable Tariff provisions, but was included within the terms of such protective heater service to give the carrier complete control over the shipments without instructions for handling from the shipper.

II. UNDER PERISHABLE PROTECTIVE TARIFF NO. 14, ICC 25, RULE 515, GOVERNING CARRIERS' PROTECTIVE SERVICE, WITH THE GLADIOLI BULBS ENTIRELY UNDER CONTROL OF THE CARRIERS, IT WAS THE CARRIERS' DUTY TO DETERMINE THE STANDARD OF CARE AND HANDLING FOR TRANSPORTATION WITHOUT NEGLIGENCE.

Under Tariff Rule No. 130, the carrier, in shipments of perishable goods, undertakes to retard from deterioration or decay "insofar as may be accomplished by reasonable protective service of the kind and extent requested by the shipper, performed without negligence" (Rule No. 130, ICC 25) (Petition 5).

Carriers' Protective Service was requested in Heater Territory from Grants Pass, Oregon, to Chicago, Illinois. Shippers' Specified Service — Rule 514 beyond to Hartford, Michigan.

The shipper, with years of experience of shipping carloads of Gladioli bulbs, did find these instructions proper to insure safe transportation (R. 135, 136, 146).

Tariff Rule No. 135 (Petition 5) states: " * * * The duty of the carriers is to furnish *without negligence* reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because * * * the *directions* of the shipper were incomplete, inadequate or ill-conceived".

The bulbs were in good condition and in a dormant state when shipped (R. 475, 503). With ventilation, inside car temperatures of 40 to 60 degrees are not too high for safe transportation (R. 136, 412). Without ventilation, a temperature of as low as 40 degrees would be too high (R. 156, 363, 412), as bulbs sweat and create moisture when loaded for shipment (R. 136, 156, 417). Without ventilation, at temperatures of 40 to 45 degrees, in moist condition, the bulbs will break their dormancy and commence to grow (R. 156, 363, 412).

The inside car temperatures from Klamath Falls, Oregon to Council Bluffs, Iowa, ranged from 40 to 46 degrees or more in all cars (R. 309-314). Temperatures are not shown by the carriers from Grants Pass, Oregon, to Klamath Falls, Oregon, taking two to three days in transit,

or from Council Bluffs, Iowa, to Hartford, Michigan; but, on arrival at Hartford, inside car temperatures were 90 to 100 degrees (R. 193, 197, 201-202, 376-377).

Petitioner does not claim in its brief that the carriers used due care to protect against the mortality of the bulbs under Rule No. 130, nor that the carriers acted without negligence, nor that the directions of the shipper were incomplete, inadequate or ill-conceived under Rule 135, but attempts to excuse the carriers by claiming that under Carriers' Protective Service the carriers could not furnish ventilation to prevent over-heating.

It was the carriers' duty under the Tariff Rules No. 130, 135 and 515, ICC 25, to maintain a degree of temperature in the cars that would not set natural characteristics or the inherent infirmity of the bulbs in motion by breaking their dormancy and commencing growth. This is what the lower court meant by "degree of temperature that would not cause freezing, or overheating" (R. 505).

Naturally, once a growing condition was created in the cars, the bulbs broke their dormancy and commenced to grow. The growing bulbs naturally gave off energy in the form of heat, but the resulting damage was caused by the negligence of the carriers in failure to use due care to preserve the bulbs. In *Williston on Contracts,* Sec. 1093, it is said:

> "The extent of the carrier's duty in regards to such goods is to use reasonable care and diligence to preserve them from their own mortality." *Nchell vs. Valles Cura,* 293 U. S. 296, 55 SCT 194, 79 LED, 373. *The Chesapeake & Ohio Ry. Co. vs. Thompson Mfg. Co.,* 270 U. S. 416, 46 SCT 319, LED 695.

The carrier is liable if its negligence was conducive to setting the inherent infirmity of the goods in motion. 13 CJS — *Carriers,* Sec. 79, p. 153-154.

While the record does not show it, had the car temperatures been maintained around 32 degrees, the standard set by the carrier, ventilation would not have been necessary; but, at temperatures of 40 to 45 degrees, it was essential to remove the moisture from the cars by ventilation (R. 136, 137, 152, 153, 156, 417, 505).

Respondent has pointed out that ventilation to reduce car temperature was within the definition of the term "Car-

riers' Protective Service", as found by the lower court, in holding the trial court's instruction not erroneous.

The verdict of the jury was consistent with the facts in the special finding that the bulbs were damaged by lack of ventilation by reason of the negligence of the carrier, and also as a general verdict it is consistent with a finding that the bulbs were damaged by over-heating, not by mechanical means, but by reason of the carriers' failure to furnish proper care and attention, including ventilation.

III. FURNISHING OF VENTILATION IN CONJUNCTION WITH CARRIERS' PROTECTIVE SERVICE IS NOT PROHIBITED, BUT IS AUTHORIZED BY APPLICABLE TARIFF PROVISIONS OF PERISHABLE PROTECTIVE TARIFF NO. 14, ICC 25.

(a) Answer to Paragraph I (a), Petitioner's Brief.

Is there any merit to Petitioner's contention that ventilation service was not authorized in Perishable Protective Tariff No. 14 ICC 25, in conjunction with the heater service called Carriers' Protective Service, to prevent overheating, natural or otherwise, where not the result of mechanical means?

To determine this question takes more than a conclusion, but an analysis of the applicable tariff rules. Such an analysis does not support Petitioner's contention.

The basis of Petitioner's contention that the carriers are prohibited from furnishing ventilation under Carriers' Protective Service is Rule 330 (A), ICC 25, which reads as follows:

> "A. Ventilation in conjunction with refrigeration service or protective service against cold will be supplied only to the extent authorized in the rules governing the class of refrigeration service or protective service against cold to be furnished."

Under this rule the question narrows itself to "the extent authorized" in Rule 515, ICC 25, governing Carriers' Protective Service.

But Rule 515 specifically gives the shipper the choice of such service, with ventilation or without ventilation, as

provided in Paragraph (D) thereof, which reads as follows:

> "(D) On a shipment originating in heater territory (Part I), shipping order and bill of lading must carry one of the following instructions:
> 'Carrier's Protective Service'
> 'Carriers' Protective Service: keep vents closed'."

Paragraph (A) of Rule 515 reads:

> "(A) Carriers' Protective Service will be furnished within Heater Territory on perishable freight loaded in refrigerator cars, subject to the following:
> 1. On shipments originating within the Heater Territory (Part I), upon request of shipper, except as otherwise provided in Paragraph B."

The refrigerator cars must be equipped with ventilating devices as required by Rule 500, as provided as follows:

> "(A) Application: — The rules and charges published by this Section covers Carriers' Protective Service * * * and Shippers' Specified Service, as defined * * * and apply on shipments of perishable freight * * *."
> (B) Exceptions: — Services referred to in Paragraph A will not be applicable on:
> 1. Shipments loaded in a refrigerator car not equipped with *ventilating devices* * * *." (Italics supplied).

Paragraph B of Rule 515 deals with potatoes and has no application here.

Paragraph C of Rule 515 deals only with apples and pears and obviously doesn't govern this case, but consideration of that paragraph offers a fair interpretation of Carriers' Protective Service in reference to handling of these bulbs relative to ventilation. It, in part, provides:

> "When a shipment forwarded from origin under ventilation is subsequently placed under Carriers' Protective Service, ventilation *instructions* will be canceled at the time it is placed under Carrier's Protective Service, and it will be thereafter handled in

heater territory (Part 1) without regard to such *instructions.* After shipment passes beyond heater territory (Part 1) it will be handled under standard ventilation as provided in Section 3, unless shipper, owner of consignee files specific *instructions* to the contrary." (Italics supplied).

The key word is "instructions". That paragraph does not say ventilation will be canceled. It says ventilation *instructions* will be canceled, and shipment will thereafter be handled in Heater Territory without regard to the shipper's *instructions.* It does not say ventilation is authorized while under Carriers' Protective Service, but it doesn't say it is prohibited. Where ventilation is required for safe transportation of the perishable goods before being placed under Carriers' Protective Service and afterwards, can any other conclusion be reached but that ventilation will be furnished while under Carriers' Protective Service? The implication is plain that the carriers take full control of the ventilation while in heater territory, in order to carry the goods safely in accordance with their legal duties without negligence.

The service contracted here was *not* "Carriers' Protective Service: keep vents closed".

The jury found the bulbs damaged by lack of ventilation in transit by reason of negligence of the carrier (R. 432).

The lower court did not impose upon the carriers an additional or special service; it only held the carriers responsible for failure to render the service contracted.

(b) Answer to Paragraph I (b), Petitioner's Brief.

Petitioner contends that Carriers' Protective Service was mandatory for shipment of these cars (R. 502, 513, Petitioner's Brief, p. 14), and that no other car service could be ordered, such as furnishing of ventilation, which Petitioner assumes was not included in Carriers' Protective Service. Noting in Rule 515 Par. (C), ICC 25, that ventilation instructions will be canceled under that protective service, the Rule is subject to the conclusion that Carriers' Protective Service is mandatory in heater territory, but Respondent cannot agree with Petitioner's statement that if ventilation service could have been ordered it was not,

for, in fact, on two cars the instructions on the Bills of Lading commenced with the words "Standard Ventilation", (R. 17, 21), which Respondent has always assumed referred to Shippers' Specified Service, but nevertheless, it was there. Further, Respondent cannot agree with the conclusion that to furnish ventilation in heater territory was a preference and violation of law. If there was any violation of law, it would exist in violation of Title 49, United States Code, Sec. 20, Subsection 11, by the carrier in promulgating tariff rules exempting itself from liability for failure to use reasonable care in shipment of perishable goods.

Watson Brothers Transportation, Inc. vs. Feinberg Kosher Sausage Co. (1951) 193 F 2d 28, 101 F Supp. 403.

(c) Answer to Paragraph I (c), Petitioner's Brief.

It was held in *Atlantic Coast Line Ry. Co. vs. Georgia Packing Co.* (1947) 164 Fed. 2d page 1, where the Court was construing Tariff Rules 130 and 135, that a carrier of perishable freight is responsible for negligent failure to carry out the shipper's instructions. It was held in *Chicago and Northwestern Ry. Co. vs. Whitnack Produce Co.*, 358 U. S. 369, that the shipper makes out a *prima facie* case under the presumption of negligence of the carrier where goods received by the carrier in good condition are delivered in bad condition. And in *Southern Pacific Co. vs. Itule*, 51 Ariz. 25, 75 P 2d 38, 115 ALR 1268, 1274, it was held that the *prima facie* case must be met by the carrier's satisfying the jury that it handled the perishable goods in accordance with the shipper's instructions, given by the shipper, *and in a reasonable, prudent manner as to all matters not covered by such instructions.*

The shipper contracted for Carriers' Protective Service. Under this service, the carriers would accept no instructions from the shipper. The standard of care, the car temperature, the lighting and extinguishing of heaters and ventilation were all in control of the carriers (R. 503). The lower court found this service to include the duty to ventilate at the proper times and places, holding the carriers liable, not as an insurer, but for the negligent failure, as found by the jury (R. 505).

(d) Answer to Paragraph I (d), Petitioner's Brief.

Respondent has shown that Tariff Rule 330, where applied to Rule 515, ICC 25, does not prohibit ventilation in conjunction with the heater service, but includes ventilation with heater service in a protective service entirely in control of the carrier, aptly named *Carriers' Protective Service.*

The lower court compared the similar language of the definition of Carriers' Protective Service (Item 1165) and Shippers' Specified Service (Item 1161). Rules 515 and 514, ICC 25, noting that neither service makes any mention of ventilation, although both items concerned the protection of shipment of perishable commodities against frost, freezing, or artificial over-heating. The court then construing the meaning of Carriers' Protective Service, found that the trial court had not erred to include ventilation within this term (R. 505). The lower court's conclusion is warranted. Under Shippers' Specified Service the tariff doesn't say to the shipper: "You are authorized to have ventilation in conjunction with this heater service". It says: "If you don't give further instructions for ventilation, the shipment will be handled under standard ventilation". This is provided in Rule 514 (J) ICC 25, which reads as follows:

> "J. Carriers will accept additional *instructions* for ventilation service as authorized in Section 3. In the absence of such *instruction* shipments will be handled under standard ventilation." (Italics supplied).

It is evident that furnishing of ventilation is compatible with heater service and a necessary part thereof.

From this comparison, it is logically concluded that where the carrier will accept no instructions from the shipper for handling the heaters, it would accept none as to ventilation, but intended and contracted to supply ventilation service under Carriers' Protective Service.

The lower court didn't miss the basic distinction between the two territories, so aptly described, in geographical and physical aspects, in Petitioner's Brief on page 16. All the carrier has done is withhold instructions by the shipper in one territory, and required instructions

by the shipper in the other, *A fortiori*, because of the some 2400 miles under Carriers' Protective Service, where the carrier by his own choosing has assumed complete control of the shipment, it chose not to be hampered by instructions from the shipper in any respect.

It is not a case of difference in territory, causing the carrier to refuse ventilation service in conjunction with heater service in one, and requiring it in the other, but rather the refusing of instructions in one and requiring instructions in the other.

If the tariff is clear, it is clear that ventilation service is authorized in conjunction with heater service. The duty to furnish ventilation in heater territory under Carriers' Protective Service existed as found by the lower court. Rules 330, 515, ICC 25 (R. 505).

(e) Answer to Paragraph I (e), Petitioner's Brief.

Careful examination of *Southern Pacific Co. vs. Itule*, 74 P. 2d 38, 115 A.L.R. 1268, supports the lower court's decision. In the *Itule* case, the court was making an exception to the affirmative defenses and proof required of a common carrier, under the insurer doctrine. In holding an instruction based on the insurer rule erroneous and sending the case back for a new trial, the court ruled for the first time in Arizona that in shipments of perishable fruits and vegetables the burden of proof required of the carrier to meet the presumption of negligence, where plaintiff has established a *prima facie* case, was to show affirmatively that it handled them in the method requested by the shipper, stating on page 1274 as follows:

> "This instruction was fatally erroneous, for, as we have pointed out, the law merely requires, in cases like the present, that the defendant carrier satisfy the jury that it handled the tomatoes in accordance with the instructions given by the shipper, *and in a reasonable, prudent manner as to all matters not covered by such instructions.*" (Italics supplied).

In the instant case, the gladioli bulbs were entirely under control of the carrier in heater territory, under the *protective* service, which Petitioner says was compulsory and so found by the court (R. 502). Under that service

it was the carrier's duty to determine the standard of care for safe transportation; the shipper could give no instructions for lighting or extinguishing the heaters or the degree of temperature to maintain in the cars. Inside car temperatures of 40 degrees was too high when the bulbs were in a moist condition (R. 363, 412). But, inside car temperatures from 40 to 60 degrees would have been safe for transportation, had the moisture been taken out by ventilation (R. 136, 412). Gladioli bulbs are not like tomatoes or other perishable fruits or vegetables, which will ultimately decay although no human agency has approached them after their maturity. The bulbs were in a dormant condition when shipped (R. 475, 503), and would have remained in that condition indefinitely (R. 143), except for the negligence of the carrier in handling. It is not simply a case of not artificially overheating, but one of negligent handling by maintaining too high a temperature in the cars. The carriers had determined 32 degrees to be a proper temperature for safe transportation (R. 319). But with car temperatures of 40 degrees and above in the moist condition, the carriers even increased the thermostat setting of the automatic heaters to 40 degrees in the last two cars (R. 312, 313). This was over-heating by failure to reduce the car temperatures and to take out the moisture by ventilation, as so found by the jury in the trial court (R. 432). These were things the carriers should have done within the terms of the carriers' protective service contract. These matters were not covered by instructions, as none could be given. This case falls within the reasoning of the *Itule* case, for the carriers failed to handle in a reasonable, prudent manner as to those matters under Carriers' Protective Service not covered by instructions.

IV. THE CASE DOES NOT INVOLVE A FEDERAL QUESTION OF SUBSTANCE.

(a) In answer to Petitioner's Argument II.

The question of construction of the tariff rule, though a Federal question, to the extent necessary for decision of the lower court, is not one of great public interest. In the broader aspect of furnishing ventilation in conjunc-

tion with heater service, perhaps the best indication of the importance of this question to the railroads and public is to note that the Petitioner did not make any pretense of claim that ventilation was not a part of its Carriers' Protective Service, upon its motion for judgment nothwithstanding or for a new trial, in the trial court (R. 451), or in its assignment of error on appeal, until nearly two years later (R. 4-7, 492, 494).

V. THE COURT BELOW APPLIED THE APPLICABLE TARIFF PROVISIONS TO THE CONTRACT OF CARRIAGE.

(a) In answer to Petitioner's Argument III.

Contrary to Petitioner's claim, the lower court did find the tariff provisions applicable as part of the contract of carriage (R. 502), and in doing so upheld the trial court's instruction, which specifically applied the tariff provisions to this case (R. 505).

CONCLUSION

The only question properly raised here was correctly decided in the court below in finding the trial court's instructions not erroneous by definition of the protective service set out in the applicable tariff.

It was the carriers' duty while the shipments were moving in heater territory under Carriers' Protective Service, to determine the standard of care and handling for transportation without negligence. The carriers are liable for the negligent failure to transport without damage.

It was the carriers' duty to ventilate at the proper times and places under the applicable provisions of the tariff governing these shipments. The negligent failure to do so, resulting in damage to the shipments, renders the carriers liable.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court,

and that the Petition for a writ of certiorari should be denied.

Dated: August 6, 1953.

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